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Is There a Reasonably Foreseeable Substantial Change in US Cyberbullying Jurisprudence or the Ambiguity Remains?

I. Introduction

On 16 October 2015, the first Hungarian National Cyberbullying Conference (abbreviated: MOCK) was organized in Szeged, Hungary by the Constitutional Law and the Criminal Law and Criminal Procedure Law Departments of the University of Szeged Faculty of Law and Political Sciences.[1] I had the honor to participate in this conference as a speaker. In my speech, I focused on US jurisprudence regarding cyberbullying. In my presentation, I highlighted the most crucial issues in judicial practice, like the lack of a Supreme Court (SCOTUS) decision, or the so-called "circuit split" problem. I introduced the landmark decisions of SCOTUS in students' freedom of speech and emphasized that the jurisprudence to this date is based upon these old decisions, even though these standards were worked out way before the Internet even appeared. Moreover, in this theoretical framework, I focused on cyberbullying cases, which represent the crucial elements and problems of this omnipresent phenomenon. In *Wisniewski*, I analyzed *Tinker's* reasonably foreseeable substantial disruption test, and compared it to *Kowalski*, in which the Fourth Circuit transformed an off-campus speech into on-campus. Afterwards, I conducted an in-depth analysis of *J.C.*, where the Central District Court of California summarized every problem, which makes the whole system suffer, and - most importantly – provided a solution, or at least a guideline to a possible future solution. The two steps test, or the substantial disruption inquiry might be a breakthrough in cyberbullying jurisprudence, which could very well make *J.C.* a landmark decision.

Later on, I explored *Marquan*, where we could face the hurdle how hard it is to adopt a proper cyberbullying law, which passes the constitutional muster. In each of the above-mentioned cases, the violations of First Amendment rights of the students were all examined on the merits, like in *Marquan*, but with one significant difference. In *Marquan* the student filed a suit that the cyberbullying law is too vague and overbroad, therefore unconstitutional. The New York Court of Appeals had to apply strict scrutiny to the constitutionality of the law, instead of focusing on the facts of the actual case at hand.

Nevertheless, as the conference was first of its kind, I felt the responsibility to briefly address the *status quo* in Hungary in connection with cyberbullying. I would say, it is not joyful, but there is hope and room to improve. We have no case law, no Act and not even any anti-bullying policy applied nationwide, but on 28 January 2016 we joined to KiVa, one of the most successful anti-bullying programs in the world. Therefore, I truly believe that Hungary realized the dangers of this omnipresent phenomenon before any tragedy could have occurred, and joining KiVa certainly represents this attitude.

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[1] Mikes Lili: Magyar Országos Cyberbullying Konferencia – MOCK 2015. In: *Közjogi Szemle*, 2016/1.

II. What we know about students' freedom of speech in light of SCOTUS landmark decisions?

In the following I will shortly introduce some landmark cases related to students' free speech and its curtailment. The greatest problem with these cases is that they were born before the blasting spread of the internet, thus nowadays the courts try to apply the *ratio decidendi* and the tests created in these old decisions.

Firstly, the most important case in students' free speech jurisprudence in US is *Tinker*.[2][3] John Tinker, a 15-year-old student decided during the holidays to wear a black armband to express his support for a truce in the Vietnam War. When the school board heard about his plan, they adopted a policy, in which they prohibited wearing these kinds of armbands and suspended the students until they wore them. In light of this policy, when Tinker and his friends appeared in the school with these armbands, the principals sent them home until they reconsidered wearing the accessory. On appeal to the District Court's decision, the Court of Appeals for the Eighth Circuit decided on the issue and the case made its way to SCOTUS, where they found that *"[o]ur problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities".*[4]

After SCOTUS defined the problem, they analyzed the situation and delivered a landmark decision about this passive, non-aggressive *"pure speech"*[5], which established the basic test to handle students' free speech and its collision with the rules imposed by school authorities. Moreover, *Tinker* created the often cited "schoolhouse gate" formula, meaning that "*either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate*".[6][7] This phrase will have significant importance in any electronic speech cases, because at any time, when students' speech takes place outside the school(house gate) the problem of location appears (e.g. off-campus speech could become on-campus) and in almost every case then, courts should recall the "schoolhouse gate" doctrine.

Nevertheless, *Tinker* created an extremely important standard:
"The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be

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[2] *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)
[3] See Martha McCarthy: Cyberbullying laws and first amendment rulings: can they be reconciled? *83 Miss. L. J. 805*, 2014, p. 813; David R. Hostetler: Off-campus cyberbullying: First Amendment problems, parameters, and proposal. *2014 BYU Educ. & L. J. 1*, 2014, 6. p.
[4] Tinker 507. p.
[5] Id. 508. p.
[6] Id. 506. p.
[7] See Merle Horowitz - Dorothy M. Bollinger: *Cyberbullying in Social Media within Educational Institutions - Featuring student, employee, and parent information.* Rowman & Littlefield, United Kingdom, 2014, 35. p.

secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."[8]

The *Tinker* standard created two prongs: it *"reasonably forecast(s) a substantial disruption because of the expression, or it collides with the rights of others."*[9] As we can see, these two elements are not conjunctive, thus the standard gives two options for courts in their future decisions. However, we should keep in mind, that in 1969 the internet did not even exist as it does today, so the reasonably forecast substantial disruption element of *Tinker* was much easier to define than it is now, with the spreading of social media sites, smart phones and free Wi-Fi systems.

The relevance and the importance of *Tinker* will be more understandable later on, when I will introduce some cyberbullying cases, where *Tinker* was used to delineate students' free speech and the boundaries of schools' authorities.

Furthermore, following the development of cases dealing with the above-mentioned First Amendment issues, I now present the core of the *Fraser* doctrine. This standard was created in *Fraser*,[10][11] where a high school student (Matthew N. Fraser) referred to his opponent with sexual metaphors during his speech in front of 600 other students in an educational program. On the next day the principal suspended him and removed his name from the candidates' list for graduation speaker at the school's commencement exercises, by reason of an alleged violation of the school's "disruptive conduct rules". Later the respondent filed suit in a Federal District Court for violating his free speech rights,[12] and the District Court and later the Court of Appeals for the Ninth Circuit held that the school's rule was *"unconstitutionally vague and overbroad"*[13]. These elements will have significant meaning later on in *Marquan*. The Ninth Circuit also stated that the speech analyzed in *Tinker* is indistinguishable from the one in *Fraser*.[14] The SCOTUS opinion clarified some key elements of students' freedom of speech in connection with *Tinker* as well. First of all, they stated that there is a difference between the constitutional protection of an adult's and a minor's, student's speech. In their words: *"simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. ... we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."*[15][16] Second of all, the *Fraser* standard was set up, the core elements of which are the following: *"[t]he First Amendment does not prevent the school officials from*

[8] Tinker: 508. p.
[9] McCarthy 2014: 813. p. *emphasis added*
10 *Bethel School District v. Fraser*, 478 U.S. 675 (1986)
[11] See also McCarthy 2014; Hostetler 2014.
[12] Fraser: Id. 679. p.
[13] Id. 679. p.
[14] Id.
[15] Id. 682. p.
[16] Horowitz - Bollinger 2014: Id. 35. p.

determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission"[17].

Last but not least, a significant distinction can be seen from *Fraser* between two types of speech, a pure political speech and a sexually explicit speech, which glorifies male sexuality and insults teenage girls.[18]

In light of these statements we can safely say that the vulgar, lewd or offensive speech is not protected by the First Amendment in a controlled, school environment; however, the same content could deserve the protection of the Federal Constitution in case such speech is delivered by adults.[19] Nevertheless, we have to recall, that in those days, the Internet was not at the general disposal of the population to exchange views, opinions and to exercise free speech. However, the basics of the legal collision between students' and school authorities' rights and duties relating to free speech were as much established in *Fraser* as in *Tinker*.

Furthermore, the last case, although not directly relevant to the issue of cyberbullying, is the *Morse*.[2021] In this case a sort of "Morse-code" was created by SCOTUS, based on the following fact pattern. At a *"school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use"*, and the principal (Morse) directed the students to take down the banner, but one of them refused, thus the principal suspended him.

In the opinion of the Ninth Circuit, the principal violated the student's freedom of speech, but SCOTUS reversed the decision. In his reasoning, SCOTUS concluded that the principal's measures exemplified how seriously the school took the dangers of illegal drug use. Moreover, as they argued, *„[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."*[22] As far as Martha McCarthy stated in one of her articles: *„promoting illegal drug use could be curtailed without the link to a disruption"*[23] and *„the Court in Morse created a new standard excluding expression from constitutional protection based on „student welfare."*[24]

These three SCOTUS landmark decisions – *Tinker*, *Fraser* and *Morse*, actually even four with *Hazelwood*,[2526] remain unaddressed in this paper, but still constitute the basics that enable us to understand the problems around cyberbullying and students' free speech.

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[17] Fraser: Id. 685. p.
[18] Id. 680. p.; 683. p.
[19] See McCarthy 2014: Id. 814. p.; Horowitz – Bollinger 2014: Id. 51. p.
[20] *Morse v. Frederick*, 551 U.S. 393 (2007)
[21] See also McCarthy 2014; Hostetler 2014.
[22] Morse: Id. 15. p.
[23] McCarthy 2014: Id. 814. p.
[24] Id. 814. p. note 33.
[25] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) was also a very important case in the evolution of students' freedom of speech. See McCarthy 2014: Id.

The main reason why I analyzed and introduced these cases is that many cyberbullying cases making their way through the court system are decided upon these standards, thus it seemed appropriate to highlight the crucial elements of these opinions in a logical framework underlying the analysis of the US approaches to the topic.

III. Was it reasonably foreseeable? The decision in Wisniewski v. Board of Education of the Weedsport Central School District[27]

Aaron Wisniewski, an eight grader challenged his suspension in violation of his First Amendment rights. Aaron was using an Instant Messaging program (IM) at home, on his parents' computer, i.e. in an off-campus environment. The IM he used allowed its users to create an icon to identify him during online conversations.[28] Aaron's icon *"was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood."*[29]Moreover, beneath this drawing he wrote "Kill Mr. VanderMolen", his English teacher. While he was using this drawing as identification icon, he displayed it to 15 members of his so called "buddy list" in IM for three weeks.[30] Meanwhile, another student showed the drawing to Mr. VanderMolen, who was distressed by this information and forwarded the picture to the school principals. After Aaron admitted his act, he was suspended for five days. VanderMolen, on his own request, was allowed to stop teaching Aaron's class; furthermore, Aaron was subjected to an interview by a police investigator and an evaluation by a psychologist. Each of these declared that Aaron's action was a joke and he had no violent intent and posed no real threat to the school employees and the school environment.[31] However, later on, a hearing by the superintendent was held, with her decision being that the icon was threatening and disrupted the school environment. Therefore, Aaron was charged under the New York Education Law for violation of school rules.[32] Pursuant to the superintendent's decision Aaron was suspended for a semester. A year later, his parents filed a suit on his behalf against the Board and the superintendent on five counts. The first count claimed that the icon was not a true threat, thus it was protected by freedom of speech. The second and third counts alleged that the Board and the superintendent had failed to train the school staff on threat assessment, the lack of which training led to the violation of First Amendment rights of their child. The fourth and fifth counts stated that the defendants violated the New York Education Law.[33] Under the foregoing facts, the District Court determined that *"the icon was reasonably to be understood as a 'true threat'."*[34] On appeal, the Second Circuit Court of Appeals did not intend to resolve the

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[26] See in detail also McCarthy: Id.; Hostetler 2014: Id.
[27] *Wisniewski v. Board of Education of Weedsport Central School District*, United States Court of Appeals for the Second Circuit (2007)
[28] Wisniewski: Id. 3. p.
[29] Id. 4. p.
[30] Id.
[31] Id. 5. p.
[32] Id.
[33] Id. 7. p.
[34] Id.

dispute between the parties, but focused on the merits of the First Amendment claim.[35] The Second Circuit examined the SCOTUS decision in *Watts v. United States*[36], where the notion of 'true threat' was analyzed. According to that judgment, the Court argued that the school officials have *"significantly broader authority to sanction student speech than the Watts standard allows."*[37][38] In conclusion, the Court declared that Aaron's speech established a reasonably foreseeable risk to cause a substantial disruption in the school environment; therefore, it was not protected by the freedom of speech.[39] As we introduced above in *Tinker*, a reasonably foreseeable substantial disruption authorizes the school officials to curb the students' First Amendments rights.[40]

This element of *Tinker* already served as a basis of other sister Circuit Courts opinions: (i) *Snyder I*[41] in Third Circuit, where the Court ruled in favor of the school under reasonably foreseeable disruption test. However, this decision was actually reconsidered a year later in *Snyder II*[42] by the same court, and declared that under the circumstances of the case, a reasonably foreseeable substantial disruption did not stand;[43] and (ii) in *Kowalski*[44] in the Fourth Circuit, which Court actually turned an off-campus action into on-campus, and applied *Tinker's* reasonable foreseeability test.[45] There are two significant distinctions we shall emphasize between *Kowalski* and *Wisniewski*. First of all, *Kowalski* was a student-on-student scenario as opposed to *Wisniewski*. Second of all, the Fourth Circuit transformed an off-campus speech into on-campus and applied *Tinker*'s foreseeablity test. However, the application of *Tinker* in this case created a controversy, because under SCOTUS jurisprudence a "bedrock principle" was laid down (as I will elaborate below, in *J.C.*), namely *Tinker* is the general test for students' freedom of speech cases, however, if a speech is evaluated as on-campus, special tests should be applied, like *Fraser* for vulgar and lewd speech, or *Hazelwood* for school-sponsored events. In *Kowalski,* however, the Fourth Circuit applied the general test to an on-campus case, which is actually in clear contradiction with the ancient legal principle of *lex specialis derogat legi generali.* Under this principle a special test deteriorates the general one. The Second Circuit did not commit this mistake in *Wisniewski*, because they did not transform Aaron's speech into on-campus, but applied *Tinker* to off-campus expression. Furthermore, they declared and emphasized that *"off-campus conduct can create a foreseeable risk of substantial disruption within a school."*[46] The Second Circuit

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[35] Id. 8. p.
[36] *Watts v. United States*, 394 U.S. 705, 708 (1969)
[37] Wisniewski: Id. 9. p.
[38] Horowitz - Bollinger 2014: Id. 48. p.
[39] Id.
[40] Jocelyn Ho: Bullied To Death: Cyberbullying And Student Online Speech Cases. *64 Fla. L. Rev. 789*, 2012, 802. p.
[41] *JS Ex Rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F. 3d 915 - Court of Appeals, 3rd Circuit (2011)
[42] Id. The first *Snyder* judgment was reconsidered in this decision a year later in 2011. The second opinion was filed in 13 June 2011.
[43] Ho 2012: Id. 805-806. pp.
[44] *Kowalski v. Berkeley County Schools*, 652 F. 3d 565 - Court of Appeals, 4th Circuit (2011)
[45] Tamás Pongó: Anglo-Saxon Approaches To Students' Freedom Of Speech And Cyberbullying: Constitutional Foundations For A Comparative Analysis. In: S.C. Universul Juridic S.R.L. (ed.): *European Legal Studies And Research.* Timisoara, 534-546. pp., Timisoara, 2015, 543. p.
[46] Wisniewski: Id. 11-12. pp.

underlined that in *Morse* SCOTUS held that *"it had no occasion to consider the circumstances under which school authorities may discipline students for off campus activities."*[47] The argument of the Court sounds logical, but might be too harsh regarding the foregoing interpretation of the case. In *Morse,* the promotion of illegal drug use by a banner during school time, under school supervision, established the authority to the school principal to curb the student's First Amendment rights. However, under those special circumstances we cannot conclude that there is no necessity to explore the circumstances in each case, before we give the power to schools to discipline their students for their speech. Besides this concern, the Second Circuit's opinion fits better in the theoretical framework of students' freedom of speech and cyberbullying jurisprudence, than the *Kowalski* opinion of the Fourth Circuit.

Furthermore, we should highlight Judge Walker's opinion in *Wisniewski*, who fully concurred with the majority, but we would like to also emphasize that an off-campus student speech could be disciplined by the school *"only if it was foreseeable to a reasonable adult, cognizant of the perspective of a student, that the expression might reach campus."*[48]

In summary, the Second Circuit concluded that it was reasonably foreseeable that the icon would reach campus, i.e. the school premises, and would cause substantial disruption in the school environment.[49]

However, we should also emphasize that the Court did not decide whether a one semester suspension exceeded any constitutional limitation that might exist; they just held that the First Amendment claims were properly dismissed by the District Court.[50]

The foregoing facts and decisions underline the necessity of a SCOTUS landmark decision in cyberbullying cases, to clear the anomalies in the current jurisprudence and to guide school officials, students and courts, how to handle off-campus cyberbullying cases, which have significant effects on the school premises and environment. In the absence of this landmark decision, all that remains will be "circuit splits", which will lead us to a vague and overbroad, ambiguous judicial practice in the field of cyberbullying and off-campus originated student freedom of speech cases.[51] A possible solution or at least a guideline to a solution to the problem could be provided from the case that I am going to analyze below.

IV. The Solution? - J.C. v. Beverly Hills Unified School District[52]

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[47] Id. 12. p.
[48] Id. 13. p.
[49] Id. 13-14. pp.
[50] Id. 15. p.
[51] For arguments, why SCOTUS refuses to grant certiorari in cyberbullying cases see Susan S. Bendlin: Cyberbullying: When is it „School Speech" And When is it Beyond the School's Reach? *5 N.E. U. L.J. 47*, 2013, 66. p.
[52] *J.C. v. Beverly Hills Unified School District*, United States District Court Central District of California, CV 08-03824 SVW, (2009)

In the present case the following material facts were undisputed. J.C. was a high school student, who recorded a video after school, in a restaurant with her friends. On the video, one of J.C.'s friend talked about the targeted student C.C., using profane and vulgar language. During the recording, J.C. encouraged her friend to keep talking about C.C. On the same day, J.C. uploaded this video to YouTube from her home computer and contacted 5 to 10 students, including C.C. to watch it. J.C. asked C.C. whether she should delete the video, but C.C., on her mother's advice, did not ask her to do so, so that she could show the recording to the school officials on the next day. She did so indeed, and did not want to attend classes, because she felt herself humiliated and hurt. However, the school counselor convinced her to go to class, so she skipped only a single one.

J.C. was suspended for two days due to her action. The video was watched approximately by fifteen students and by school officials during the investigation, but it is an important fact that YouTube was blocked on school computers, so the students could not watch the video on campus. According to the records of the investigation, the video was opened on campus only during the viewing of the footage by school officials.[53]
J.C. filed a suit for violation of her First Amendments rights and the case was decided by the United States District Court for the Central District of California.

Upon this factual background, we should focus on the merits of the First Amendment free speech claim underlying *J.C.*. The issue was whether the school had the authority to discipline J.C. for her off-campus speech, or rather her freedom of speech rights were violated by the school's action. *"To resolve this issue, the Court must first determine the scope of a school's authority to regulate speech by its students that occurs off campus but has an effect on campus."* – argued the Court.[54] According to this logic, the Court briefly introduced *Tinker, Fraser, Hazelwood* and *Morse* and the legal standards and tests worked out in and by these landmark rulings.

Afterwards, the Court cited Circuit Court decisions in connection with off-campus cases, which "reached the campus", i.e. became applicable to on-campus conduct through interpretation. In *Lavine v. Blaine School District*[55], the Ninth Circuit analyzed the case under *Tinker* regardless the off-campus origin of the speech. In *Lavine,* the Ninth Circuit set up the following framework for applying SCOTUS student speech tests: (i) vulgar, lewd, obscene, plainly offensive speech governed by *Fraser*, (ii) school-sponsored speech governed by *Hazelwood,* and (iii) other speech, which is not covered by the foregoing tests is governed by *Tinker.*[56](Actually, according to the Ninth Circuit opinion, this framework was set up by the Ninth Circuit in *Chandler v. McMinnville School District* – earlier on.)[57] Nevertheless, we should highlight that this system was supplemented by SCOTUS in *Morse*, which decision governs student on-campus cases regarding illegal drug abuse.

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[53] *J.C.* 2-6. pp.
[54] Id. 8. p.
[55] *Lavine v. Blaine School District*, 257 F. 3d 981 - Court of Appeals, 9th Circuit (2001)
[56] *J.C.* 13. p.
[57] Id. 13. p. footnote 3.

Besides this framework, in *Lavine* the Ninth Circuit analyzed *Tinker's* substantial disruption test and concluded that the school could reasonably foresee a future substantial disruption in the school environment.[58]

Furthermore, the Central District Court of California in our case at hand cited several cyberbullying cases, which were decided under the substantial disruption test regardless the off-campus origin of the speech.[59] Consequently, the Court stated, where the foreseeable risk of substantial disruption is established, the schools' actions to curb the students' First Amendments rights were permissible.[60]

However, the Court noted that some Circuit Courts (especially the Second Circuit) considered the location of the speech highly important, and these courts should resolve the origin issue before applying any SCOTUS tests.[61] However, *"[d]etermining where internet speech occurs is almost as thorny an issue as determining when life begins."*[62] Besides, to strengthen his aspect, the Court cited *Wisniewski* (cf. above) and emphasized that the Second Circuit first discussed the nexus between the speech and the school. Ultimately, the Second Circuit found the nexus well-established in *Wisniewski* and applied *Tinker's* foreseeable substantial disruption test, but without transforming the speech into on-campus, as the Fourth Circuit did in *Kowalski*. This approach fits in the theoretical framework created by the Ninth Circuit, because none of the SCOTUS tests are applicable to off-campus speech but *Tinker*. Therefore, as they concluded, in *J.C.*, the Central District Court of California should apply *Tinker*.

However, we shall highlight the danger of this system regarding cyberbullying jurisprudence, namely that most of the cases are dealing with off-campus originated student speech, which then has significant effect on-campus, just like in *J.C.*, but without in itself becoming on-campus speech. Therefore, none of the SCOTUS student freedom of speech tests, except *Tinker*, will be applicable to these cyberbullying cases, because those tests govern only on-campus scenarios, but those cases will not be treated as on-campus speech. In sum, only *Tinker* will be applicable to off-campus originated student speech with on-campus effect.

In his judgment, the Central District Court of California called on *Doninger v. Niehoff*, decided by the Second Circuit as well, and on *J.S. v. Betlehem Area School District* by the Supreme Court of Pennsylvania, where the nexus between the speech and the school were the first inquiry.[6364] In these foregoing three cases (*Wisniewski, Doninger, J.S.*) the nexus was examined at first and under the factual circumstances, the speech was treated as off-campus with significant effect on-campus; and was decided under *Tinker*. In my opinion, this two-step analysis provides an excellent way to handle cyberbullying cases, but courts should be aware to declare under which circumstances an off-campus speech is

[58] Id. 13-14. pp.
[59] See J.C. 14-15. p.
[60] Id. 15. p.
[61] Id.
[62] Bendlin 2013: Id. 48. p.
[63] J.C. 16-18. p.
[64] See Horowitz – Bollinger 2014: Id. 43. p.

assessed or becomes on-campus. Furthermore, if the speech is treated as on-campus, then courts should first apply the special SCOTUS on-campus tests (*Fraser, Hazelwood, Morse)*, before applying *Tinker.*[65]

If this two-steps approach would be used and applied nationwide, then the cyberbullying jurisprudence in US would become less ambiguous and vague. This standard could establish a much more predictable framework to courts, scholars, school officials and students as well.

This foregoing analysis and conclusion, which is based on the *J.C.* opinion of the Central District Court of California, could serve as guideline to courts. However, the analysis of case law was not the only important statement of this judgment. The Court also summarized several general conclusions regarding off-campus student speech cases.

First, off-campus speech, which is brought to school or to the attention of school authorities, regardless of the geographical origin, and causes or foreseeably might cause substantial disruption in the school is governed by *Tinker*, and could be regulated by the school, according to the majority of courts.[66]

Second, some courts will apply SCOTUS tests only where there is a sufficient nexus between the speech and the school. However, it is still unclear when this nexus exists. According to the Second Circuit it does, when it is *"'reasonably foreseeable' that the speech would reach campus".*[6768] This approach is mostly used by the Second Circuit, but we saw this viewpoint reflected in *J.S.* as well.

Third, in those cases, where students took specific efforts to keep their speech off-campus, the SCOTUS standards are not applicable.[69]

These foregoing principles were analyzed in *J.C.* by the Central District Court of California, and the Court held that under the framework created by the Ninth Circuit, the geographical origin did not matter, because *Tinker* was applicable to on-campus and off-campus speech as well. If the Court would apply the Second Circuit's approach and considered the origin of the speech, the sufficient nexus would be well-established under the foregoing factual circumstances (C.C. came to school with her mother on the next morning, the video was viewed by schoolmates, and at least two times during the investigation), thus it would be reasonably foreseeable that the speech would made its way to campus.[70] Moreover, J.C. did not make specific efforts to keep the speech off-campus,[71] thus, in consequence, the Court ruled that *Tinker* governed the case, but it

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[65] Bendlin 2013: Id. 65. p.
[66] J.C. 22. p.
[67] Id.
[68] For more examples when sufficient nexus exists see Atticus N. Wegman: Cyberbullying and California's Response. *47 U.S.F. L. Rev. 737*, 2012-2013, 755-756. pp.
[69] J.C. 22. p.
[70] Id. 22-23. pp.
[71] Id. 25. p.

should be decided whether it caused or is reasonably likely to cause a substantial disruption.[72]

J.C.'s substantial disruption inquiry

Under the above-mentioned test, the Court concluded that *Tinker* should be applied to this case; however, it was still undecided whether actual or reasonably foreseeable substantial disruption occurred. In order to resolve this issue, the Court created an inquiry, which was highly fact-intensive and the existing case law did not provide clear guidelines.[73] However, certain factors bear relevance to this analysis.

First of all, general rumblings or buzz is not sufficient to reach the level of substantial disruption.[74]

Second of all, when the student speech is violent or threating to members of the school, several court have found the reasonably foreseeable substantial disruption established. As we could see in *Wisniewski*, solely the violent content of the speech could constitute this foreseeable disruption.[75]

Third of all, courts should explore whether school officials are pulled away from their ordinary tasks to handle the case.[76]

Last but not least, courts must consider whether the school's action was based on evidence or fact regarding the indication of foreseeable substantial disruption.[77]

The Court explored the case under the foregoing facts and ruled that J.C.'s speech did not cause actual or reasonably foreseeable substantial disruption.[78][79]

Under the first point of inquiry, the Court concluded that an upset parent and student, who missed a single class, did not rise to the level of substantial disruption.[80]

Pursuant to the second part of the test, J.C.'s video was not violent and did not contain any threat to any member of the school. There was no confrontation either between J.C. and C.C., or between any other students and C.C.

Thirdly, handling conflicts between students, who hurt each other's feelings, by the principal and the counselor's help to process the effects of a conflict in connection with

[72] Id. 27. p.
[73] Id. 28. p.
[74] Id. 46. p.
[75] Id. 33-34. pp.
[76] Id. 34. p.
[77] Id. 36. p.
[78] Id. 40. p.
[79] Horowitz - Bollinger 2014: Id. 39. p.; Wegman 2012-2013: Id. 751. p.
[80] Horowitz - Bollinger 2014: Id. 39. p.; Wegman 2012-2013: Id. 752. p.

this "clash", is the actual duty of school officials. Therefore, they were not pulled away from their tasks, more likely they fulfilled their official duties very well.

Lastly, the Court concluded that the school did not present any evidence to support his action to discipline J.C. for her video.[81]

Besides these elements, the Court explored whether any evidence could support the argumentation of the school that a disruption was reasonably foreseeable. However, the Court found that there was no evidence regarding prior, relevant, relationship between J.C. and C.C. moreover, no physical or verbal confrontation did occur. Furthermore, there was no history in the school similar to this situation, which caused any substantial disruption.

In sum, the Court did not find actual or reasonably foreseeable substantial disruption well-established.

Nevertheless, *J.C.* is a landmark decision in my reading, because it highlighted crucial issues regarding cyberbullying cases and provided a solution or at least a guideline to a possible future solution. The Court summarized the existing case law and marked the distinctions among Circuit Courts, so called 'circuit splits', and analyzed the case under both (Ninth Circuit and Second Circuit) approaches. According to the Second Circuit method, courts might be able to decide when they should transform an off-campus speech into on-campus and how to handle such scenarios. If the sufficient nexus is well established, then they could decide whether it turned into on-campus, or remained off-campus. Therefore, off-campus cases should be decided solely under *Tinker*. Pursuant to this analysis, courts have to justify their rulings and cannot avoid important questions in their judgments. Moreover, the Court created a substantial disruption inquiry, which could serve as guidelines to other courts, even to higher-level courts.

Finally, the most important value of this decision is that the Central District Court of California followed the logic they created. The Court explored every element of the tests, gave reasons, and called on evidence. In consequence, I would say that this is a landmark decision. Should we have more of such well-constructed judgments, cyberbullying could be easier to deal with.

V. A different approach of the First Amendment and cyberbullying - The People of the State of New York v Marquan M.[82]

The Dignity for All Students Act in Albany County, New York criminalized cyberbullying as a misdemeanor offense. The 16-year-old high school student defendant was prosecuted for "cyberbullying" misdemeanor, because he anonymously posted sexual information about fellow classmates in a Facebook group called 'Cohoes Flame', named after the defendant's high school (Cohoes High School). These posts contained

[81] J.C. 40-44. pp.
[82] *People v. Marquan M.*, 2014 NY Slip Op 04881, New York Court of Appeals (2014)

photographs and detailed descriptions about the classmates' alleged sexual behaviors, sexual partners and further personal information about them.[83] Marquan admitted his authorship, but moved to dismiss the charges, stating that the local law violated his First Amendment rights. The City Court denied his motion and on appeal the County Court found the local law constitutional.[84] On appeal, the New York State Court of Appeals faced the question whether the local cyberbullying statute conforms to freedom of speech under the First Amendment.[85]

Based on this factual background, we should focus on the legal arguments of the case. The defendant contended that the law was overbroad (included protected speech) and vague (did not give a fair notice to the public).[86]

The Court of Appeals explored and examined the defendant's arguments, and defined 'overbroad' and 'vague'. *"A regulation of speech is overbroad if constitutionally-protected expression may be 'chilled' by the provision because it facially 'prohibits a real and substantial amount of' expression guarded by the First Amendment."*[87] Furthermore, a statute could be declared vague, if *"it fails to give a citizen adequate notice of the nature of proscribed conduct, and permits arbitrary and discriminatory enforcement."*[88]

The main point of the Court's ruling was that the cyberbullying law at hand tried to protect children from cyberbullying, however as it was written, it covered communications aimed at adults and fictitious or corporate entities as well. Moreover, the Court highlighted that every form of communication was included, such as telephone conversations or telegram. In a broad interpretation, anyone, who via telephone conversation meant to annoy an adult, could be prosecuted under this cyberbullying law.[89] The County as a legislator admitted that the law is too broad and asked the Court to declare that some remaining part of the law is narrow enough to be constitutional.[90] However, the Court of Appeals emphasized that such a judicial rewrite would not be constitutional, because it would hurt the separation of powers and would enter the "realm of vagueness".[91] Under the foregoing facts the Court of Appeals admitted that the conduct of the defendant was harmful, vulgar and offensive, however, the cyberbullying law, under which he was charged, covered constitutionally protected speech, therefore, it was overbroad and invalid under the First Amendment.[92]

Judge Smith dissented and argued that a remaining part of the law could be constitutionally valid. Under Smith's reasoning in the dissent, the *"law does not prohibit*

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[83] *People v Marquan M.* 1. p.; 4. p.
[84] Id. 4. p.
[85] Id. 1. p.
[86] Id. 4. p.
[87] Id. 5. p.
[88] Id. 6. p.
[89] Id. 7. p.
[90] Id.
[91] Id. 8. p.
[92] Id. 9. p.

conduct intended to harass, annoy, threaten or the like unless the actor specifically intended 'significant emotional harm'. I don't find such a prohibition to be unconstitutionally vague or overbroad."[93] Judge Smith focused on the intent of the law, which tried to prohibit those kinds of communications, which had no legitimate purpose, just intended to inflict significant emotional harm and injury to children. This governing aim of the legislator should be appreciated and supported.

This case bears a huge relevance in my opinion, because usually students' cyberbullying cases in connection with First Amendment freedom of speech rights are not decided upon a strict scrutiny analysis of a law, as we could see above. In general, courts call on the SCOTUS landmark students' freedom of speech cases, like *Tinker*, *Fraser*, *Hazelwood* or *Morse* and evaluate the circumstances, cite other cyberbullying decisions.[94]

However, in this case the Court of Appeals of New York explored the vagueness and overbroad nature of the county cyberbullying law and decided the case in light of the constitutionality of the text of the law, leaving out of consideration the facts of the case.

Of course, we should bear in mind that the above-mentioned cases are not criminal procedures, but it still raises the question: is this a good way to tackle cyberbullying? In my opinion, this approach is not typical and is not the one that should be followed. This case should have been decided upon *Tinker* and the 'substantial disruption test'. Unfortunately, *Fraser* would not be applicable to the current scenario, albeit, if we declare the speech on-campus, like in *Kowalski*, *Fraser* could be applicable. Nevertheless, *Tinker's* reasonably foreseeable or actual substantial disruption tests could have resulted in a ruling against Marquan in this case. We shall notice here, that no victims filed suit against Marquan, so there were factual differences between the current and the above-mentioned cases. If they would have filed, then the Court might have used *Tinker's* reasonably foreseeable substantial disruption test and could have taken into consideration the Second Circuit Court approach to cyberbullying. Under this approach, the Court should first define whether the sufficient nexus between the speech and the school exists. If yes, did that speech turn into on-campus? If it did, then they should apply SCOTUS on-campus tests before *Tinker*. If the nexus exists, but it should be considered as off-campus speech, then *Tinker* should be applied.
Besides this hypothetical case, strict scrutiny is a high-level standard, which constitutes a great obstacle for legislators to surmount, when adopting cyberbullying laws. Therefore, it seems better to decide cyberbullying cases under facts rather than under the strict scrutiny of a law.

VI. Where are we now? - The Hungarian *status quo*

Compared to what we have seen in terms of the evolution and possible future directions for US jurisprudence, I think it is important to say a few words about the *status quo* in Hungary.

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[93] Id. 11. p.
[94] Snyder, Kowalski, Wisniewski, J.C.

First of all, we shall emphasize that Hungary is a civil law country with a centralized Constitutional Court. Therefore, our "ordinary" judges sitting in lower courts have no power to interpret the constitution, thus in our judgments we cannot find any fundamental rights argumentation, like in the above-mentioned US decisions. The Hungarian Constitutional Court is outside the ordinary court system and solely bears the power to authentically interpret the Fundamental Law of Hungary. Therefore, we have to look at the following statements through these glasses.

Now, I would like to highlight the *status quo* in Hungary regarding cyberbullying, which will not be so positive.

In comparison with US, where every state has an anti-bullying law and almost half of them cover cyberbullying as well, we don't have any such case law or legislation;[95] however, an anti-bullying law also covering cyberbullying could be an effective way to protect the victims as well.[96]

Among the achievements, we could mention the international project (Threat Assessment of Bullying Behaviour in Internet, called "TABBY"), which dealt with *"the assessment of the volume and the management of the complexities of cyberbullying among children."*[97]

In our country, there is no nationwide anti-bullying program; however a huge step was made on 28 January 2016, when the Hungarian Institute for Educational Research and Development crossed the finish line and bought the license for the Finnish KiVa program, which is one of the most successful anti-bullying programs worldwide.[98]

Moreover, the level of public awareness and the number of prevention programs are low, most of Hungarian youth don't even know what cyberbullying means, or even if they do, they are unaware how to tackle it, or how to handle similar situations. In my opinion, the introduction of KiVa will significantly raise public awareness and increase the success of prevention among our nation's youth. Prevention and educating students, parents and teachers mean the first and very important step in the fight against cyberbullying, thus its development is essential.[99]

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[95] Sameer Hinduja - Justin W. Patchin: *State cyberbullying laws.* A Brief Review of State Cyberbullying Laws and Policies, 2015.
http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf (last accessed: 31.03.2016)
[96] Ho 2012: Id. 809. p.
[97] Katalin Parti - Andrea Schmidt - Bálint Néray - György Virág: *TABBY in Internet* - The assessment of the volume of cyberbullying among students, and school mentor training in Hungary (2011-2014). In: *Anthology of College of Criminal Law Science, Beijing Normal University,* Beijing, China, 2015, 2. p.
[98] Viola Bozsi: Finland's Anti-Bullying KiVa Program to be Introduced in Hungarian Schools. 2016. http://ofi.hu/node/179809 (last accessed:31.03.2016)
[99] See Ho 2012: Id. 815. p.; Wegman 2012-2013: Id. 756. p.; Parti-Schmidt-Néray-Virág 2015: Id. 2-3. pp.

Furthermore, our legal academia writing on this topic is highly negligible, which fact decreases the scientific background of a proper future legislation in connection with cyberbullying.

In addition to the problems of future legislation, the lack of academic background has already led to another crucial issue, namely to find the most appropriate Hungarian term of bullying and cyberbullying. Important and significant information "get lost in translation" as the proverb says. For instance, in Hungary the term cyberbullying is translated as online harassment, although, this terminology misleads the whole society, because cyberbullying is an 'umbrella term', which covers online harassment, but does not function as a synonym thereof.

Thanks to a foundation, called Felelős Társadalomért Közhasznú Alapítvány (The Public Foundation for a Responsible Society), a better term used to designate (cyber)bullying become more widespread and well-known. The Foundation also achieved some important results in the field of prevention, e.g. it maintains a webpage, which helps everyone, how to tackle this phenomenon.[100]

In conclusion, Hungary is far behind the US to tackle cyberbullying, but we recognized the problem and try to address it with adequate answers, like introducing KiVa or organizing the first ever Hungarian National Cyberbullying Conference (MOCK), which was not trying to mock the legislator and the courts but to signify as a hallmark that we picked up the fight against bullying and cyberbullying.

VII. Conclusions

In this article, I tried to explore the US jurisprudence regarding cyberbullying, and to find guidelines for courts in lack of a SCOTUS judgment. I reckon that *J.C.* might provide a solution with its two-step analysis, created by the Second Circuit, and also with the substantial disruption inquiry.

The merit of this two-step test is that (i) it firstly examines the nexus under the factual circumstances; (ii) the speech is either treated as off-campus with significant effect on-campus and was decided under *Tinker*, or is considered as on-campus speech and then special on-campus SCOTUS tests become applicable.

In my opinion, this two-step analysis provides an excellent way to handle cyberbullying cases, but courts should be aware to declare under which circumstances an off-campus speech becomes or should be assessed as on-campus. Furthermore, if the speech is treated as on-campus, then courts should first apply the special SCOTUS on-campus tests (*Fraser, Hazelwood, Morse)*, before applying *Tinker.*

[100]Felelős Társadalomért Közhasznú Alapítvány Megfélemlítés Elleni Programja (Anti-bullying Program of The Public Foundation for a Responsible Society); www.megfelemlites.hu (last accessed: 18.04.2016)

Moreover, the Central District Court of California summarized several general conclusions regarding off-campus student speech cases, which helps to define, when such a nexus exists.

First, off-campus speech, which reaches the campus, regardless of the geographical origin, and causes or foreseeably might cause substantial disruption in the school is governed by *Tinker*, and could be regulated by the school, according to the majority of courts.[101]

Second, some courts try to establish a sufficient nexus between the speech and the school. However, it is still unclear when this nexus exist. According to the Second Circuit this nexus exists, when it is *"'reasonably foreseeable' that the speech would reach campus".*[102] This approach is mostly used by the Second Circuit, but we saw this viewpoint reflected in *J.S.*, a case decided by the Supreme Court of Pennsylvania.

Thirdly, in those cases, where students made specific efforts to keep their speech off-campus, the SCOTUS standards are not applicable.[103]

Furthermore, the District Court in *J.C.* created an inquiry to define when a reasonably foreseeable disruption is well-established. This inquiry could help courts follow the approach of the Second Circuit, which was introduced above.

Under this inquiry we could declare that general rumblings or buzz is not sufficient to reach the level of substantial disruption,[104] a violent or threating speech could establish reasonably foreseeable substantial disruption (as we saw above in *Wisniewski*, where solely the violent content of the speech could constitute this foreseeable disruption[105]). Furthermore, courts should explore whether school officials are pulled away from their ordinary tasks to handle the case;[106] and whether the school's action was based on evidence or fact.[107]

Pursuant to this conclusion, courts could work out clearer guidelines in cyberbullying jurisprudence, which could lead to a nearly uniform judicial practice.

In the next part, I examined *Marquan*, decided upon a First Amendment issue as well. However, in this case we realized how difficult it is to adopt a proper, constitutional cyberbullying law, and how easy is to declare provisions in an unconstitutionally vague and overbroad fashion, without exploring the actual facts of the case at hand. In my reading, Marquan filed a great complaint, because he focused on the text of the law, under which he was charged, instead of relying on the facts of the case. He could file a constitutional complaint for a violation of First Amendment in this way as well, but he

[101] J.C. 22. p.
[102] Id.
[103] Id.
[104] Id. 46. p.
[105] Id. 33-34. pp.
[106] Id. 34. p.
[107] Id. 36. p.

chose what better fit his claim. However, this method is the one, which should not be followed in the judicial handling of cyberbullying.

Last but not least, I shortly introduced the current situation in Hungary regarding cyberbullying, which could be in better shape, however, we achieved small goals, like introducing KiVa, as a pilot anti-bullying program in Hungarian schools, or agreed on a proper translation of the word '(cyber)bullying'.

Furthermore, the Hungarian National Cyberbullying Conference could be evaluated as a big success for our country and for everyone, who fights against this omnipresent phenomenon.

Prevention is a crucial element of this battle, and hopefully KiVa will increase the level of public awareness and thus the efficiency of prevention in Hungary. In my opinion, prevention and raising the public awareness could be a more effective way to tackle cyberbullying, than court procedures. However, we should establish the legal basis of court proceedings as soon as possible, and thus Hungary could provide sufficient protection of the fundamental rights of the victims.